

Comparative Powers of Charter and Non-Charter Municipalities Under Ohio Home Rule

With the overruling of *State ex rel. Toledo v. Lynch*¹ by the *Village of Perrysburg v. Ridgway*,² the basic grant of home-rule powers in Section 3 of Article XVIII³ became the political "property" of every municipal corporation by reason of its very existence as a body politic. With Section 3 self-executing, charter adoption under Section 7⁴ legally lost its significance as a condition precedent to municipal release from the shackles of State legislative control. But despite this development early in the life of Ohio home rule the legal shadows cast by the celebrated *Lynch* decision have never been completely dispelled. Thus, it is not uncommon to find non-charter municipalities operating on the supposition that the Ohio Municipal Code, promulgated ten years before eventful 1912, provides the full measure of their civic powers. Other municipal corporations have resorted to Section 7 in the belief that such procedure was essential to gain freedom in local affairs. Full understanding of the ramifications of Article XVIII of the State Constitution thus requires a careful comparison of the legal position in Ohio of charter and non-charter municipalities. Such a comparative evaluation reveals that the legally significant differences between the two types of municipal governance aggregate into three major categories.

Acting within the large area of authority yet remaining to it despite the home rule grant, the State legislature has occasionally favored the charter municipalities. Thus General Code Section 5625-14 has the effect of freeing, from both the general tax rate limitation imposed by Section 5625-2 and certain budget-commission controls established by Section 5625-24, charter municipalities whose organic acts fix a limit upon the tax rate that may be levied, without popular vote, for all municipal purposes or for current operating expenses. This same section further authorizes, for charter cities so providing, a lower percentage of popular vote necessary to ex-

¹ *State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 102 N.E. 670 (1913).

² *Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N.E. 595 (1923).

³ Art. XVIII, § 3 reads, "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

⁴ Art. XVIII, § 7 reads, "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government."

ceed the limitation set than is required by general statutory provision for the usual ten-mill limit. The vote required for approval by Section 5625-18 is in most instances 65 per cent, lowered for the current biennium to 60 per cent by act of the special session of 1947; Section 5625-14 necessitates only a bare majority vote. General Code Section 4676-1 is to the effect that if a municipality has adopted a charter which provides for or authorizes in whole or in part a method of procedure to be used in the passage and publication of legislation, the making of improvements, and the levying of assessments, different from the method prescribed by general law, the municipality may act in these matters either under general law or in accordance with the procedure prescribed by the charter.

A second category of differences in the powers of the two types of municipalities, but like the first favorable to charter cities, has its genesis in constitutional rather than statutory provisions. In some instances the advantage is possibly more apparent than real, deriving only from the happenstance of past litigation. Familiar is the not uncommon constitutional declaration that powers enumerated in the State's fundamental law shall be exercised "as provided by law." While this phrase has, as to some constitutional provisions,⁵ been held to embrace charter as well as state legislative action, there appear to be no cases holding that an appropriate ordinance enacted by a non-charter city would equally satisfy the constitutional language. But tending to negative this potential advantage to charter municipalities is the fact that in the converse situation, where identical or similar constitutional phraseology has been held to exclude local legislative action,⁶ no distinction has seemingly been drawn between charters and ordinances.

⁵ *Fitzgerald v. City of Cleveland*, 88 Ohio St. 338, 103 N.E. 512 (1919) held a charter to be a law within the meaning of Art. V, § 7 which reads, "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as *provided by law*, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality." *Dillon v. Cleveland*, 117 Ohio St. 258, 158 N.E. 606 (1927) held that a charter was a law within the meaning of Art. II, § 1f, which reads, "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter *provided by law*."

⁶ *State ex rel. v. Hutsinpillar*, 112 Ohio St. 468, 147 N.E. 647 (1925) held a charter is not a law within the meaning of Art. IV, § 1. It has been held that an ordinance is not a law within the meaning of Art. II, § 34. *Cincinnati v. Correll*, 141 Ohio St. 535, 49 N.E. 2d 412 (1943); nor within the meaning of Art. IV, § 2. *Village of Brewster v. Hill* 128 Ohio St. 354, 191 N.E. 366 (1934).

However, from the impact of Section 2 of Article XVIII⁷ flow definite advantages to charter adoption. One is the greater choice in the selection of the municipality's general plan or form of government. The first part of Section 2 empowers legislative continuation of the mayor-council type of government originally provided by the Ohio Municipal Code.⁸ Under the authorization of the latter portion of Section 2 the Assembly immediately made available, as "optional" forms, the commission, the federal, and the city-manager plans.⁹ Non-charter cities are limited to these four forms; but to charter cities this limitation has no application, leaving untrammelled their tastes in local governmental types.¹⁰ Beyond this, moreover, Section 2 has effect, but to what extent is unclear. The view, which obtains in some quarters, that this section leaves with the State legislature as comprehensive a power over municipal government as it had prior to the addition of the Home Rule Amendment, is erroneous, for the powers of self-government delegated in Section 3 cannot, without rendering that section meaningless, be deemed to be also subsumed under Section 2. Nor is this view tenable in the light of the provisions of Section 7; if Section 2 is all-inclusive, this section as well has no meaning. "Whole-statute" interpretation requires that Sections 2, 3 and 7 be each so construed as not to destroy the legitimate intendment of the other two.¹¹

Between these contrasting positions lie several possible intermediate interpretations. An Attorney General has declared that a municipality which has not adopted a charter, is controlled by general laws not only as to the form of its government, but also with respect to the distribution of municipal executive powers and the determination of the compensation of municipal officers.¹² A merger of two executive departments effected by ordinance under a section of the Ohio Municipal Code was invalidated in *City of Elyria v. Vandemark*,¹³ because the statutory classification involved

⁷ Art. XVIII, § 2 reads, "General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law."

⁸ OHIO GEN. CODE §4206.

⁹ OHIO GEN. CODE §§3515-11 to 3515-44.

¹⁰ *Switzer v. State ex rel. Silvey*, 103 Ohio St. 306, 133 N.E. 552 (1921); *Reutener v. Cleveland*, 107 Ohio St. 117, 141 N.E. 27 (1923); *Hile v. Cleveland*, 107 Ohio St. 144, 141 N.E. 35 (1923).

¹¹ COOLEY, CONSTITUTIONAL LIMITATIONS 129, (8th ed. 1927), "...one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together."

¹² 1929 OPS. ATT'Y GEN. (Ohio) No. 782, p. 1196.

¹³ *Elyria v. Vandemark*, 100 Ohio St. 365, 126 N.E. 314 (1919).

was violative of Article XVIII, Section 1.¹⁴ Although the possible validity of merger through exercise of powers of local self-government was not considered, inasmuch as the case was decided before Section 3 had been declared self-executing, the position taken by the Attorney General would seem the correct one. To interpret Section 3 as embracing municipal power to determine the allocation of departmental authority would not only limit Section 2 to state power over the general plan or form of municipal government but would, as well, largely empty of content the charter-adoption provision of Section 7. It would therefore appear that a municipality's authority to create for itself a scheme of internal administrative organization deviating from the legislative pattern should be regarded as conditioned upon the adoption of a charter.

Despite the provisions of the Ohio Municipal Code which prescribe a two-year term of office for mayor, it was held in *State ex rel. Frankenstein v. Hillenbrand*¹⁵ that "a charter may prescribe a one-year term, because the qualifications, duties and manner of selecting officers, purely municipal, came within the purview of the provisions granting a city the powers of local self-government." Again, in *Fitzgerald v. City of Cleveland*¹⁶ the court said: "It will not be disputed that one of the powers of government is that of determining what officers shall administer the government, which ones shall be appointed and which elected, and the method of appointment or election. These are essentials which are confronted at the very inception of any undertaking to prepare the structure or constitution for any government. Obviously such power would be included among 'all powers of local self-government' which any municipality has authority to exercise under Section 3 of Article XVIII as to any officers of such municipality, unless the election of such officers is not a matter of municipal concern, or unless such power has been excepted in some manner from those granted."

If specification of the mode of selection and the length of term of municipal officers are powers of local self-government, then by the *Perrysburg* rule they belong also to non-charter municipalities. However, these two decisions date from the period before Section 3 was declared self-executing, and the quoted observations in the opinions were dicta unnecessary to the results reached. It is difficult to support the thesis that non-charter municipalities possess

¹⁴ Art. XVIII, §1 reads, "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law."

¹⁵ *State ex rel. Frankenstein v. Hillenbrand*, 100 Ohio St. 339, 126 N.E. 309 (1919).

¹⁶ 88 Ohio St. 338, 344, 103 N.E. 512, 514 (1913).

independent authority as to tenure of office, for the power to create the office and fix its duties properly includes the power to prescribe the term. To hold that such municipal action is an exercise of the powers encompassed within Section 3 overly delimits the authorization in Section 2 of general legislation "for the . . . government of cities and villages."

On the other hand, determination of the method of nomination of municipal officers seems clearly allocable to the category of powers of local self-government. Such a matter bears little relation to either the plan of or the distribution of powers in local government; these embrace only the design and the structural framework within which the officers will function once they are nominated and elected. And one may well question the Attorney General's view that compensation of municipal officers is beyond the control of the non-charter municipality. *City of Mansfield v. Endly*,¹⁷ upholding an ordinance fixing a councilman's salary at a figure different from that prescribed by state law, classified salary determination as a power of local self-government under the *Hillendbrand* and *Fitzgerald* doctrine. The court's assertion, that if this be not true, the electors of the municipality would be deprived of one of the essentials of municipal home rule, provides satisfactory pragmatic justification for categorization of this matter under Section 3 rather than Section 2 or Section 7.

Dillon v. City of Cleveland presents a final problem in balanced, constitutional interpretation. As with the method of nomination of municipal officers, so municipal referendum has little to do with either the form or the functional structure of local government. The manner of invoking a referendum thus has the earmarks of a power of local self-government, and so the *Dillon* court, following the *Fitzgerald* analogy, seems to have reasoned. Yet the decision, coming as it did well after the repudiation of the *Lynch* case, contains language suggesting that the court was not, as between Sections 3 and 7, so certain of its categorization. Referring at one point in its opinion to that section of the Municipal Code, above considered, which exempts from state law municipalities whose charters contain initiative and referendum provisions, the court said: "The power of charter cities to make charter provisions regulating the manner of exercise of the referendum does not in any sense depend upon the exemptions stated in Section 4227-12. That section is merely a legislative recognition of a constitutional limitation upon its own power. The real power of charter cities is referable to Sections 3 and 7 of Article XVIII of the Ohio Constitution."¹⁸

¹⁷ *Mansfield v. Endly*, 38 Ohio App. 528, 176 N.E. 462 (1931).

¹⁸ 117 Ohio St. 258, 272 (1927).

Although it is true that charter cities are favored in certain legislative and constitutional matters, there is one overshadowing aspect to charter adoption which clearly favors the non-charter cities. Before the adoption of the Home Rule Amendment, by the very nature of things a municipal charter was a grant of power, since the only powers which municipalities had were those granted to them by the legislature. But with the adoption of Home Rule in Ohio, there was a constitutional grant of all powers of local self-government to all municipalities. Logically, then, if the power has been granted by the ultimate sovereign power through the constitution to the municipalities, it is a non sequitur to speak of a charter as a grant of power. It follows, then, if a charter is not a grant of power, that it must be a limitation of power. The permissive tone of the language of Section 7 may be used to substantiate the view that a charter is a limitation on municipal power. That section provides that "Any municipality may frame and adopt . . . a charter . . . and *may*, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." Such language clearly anticipated the use of a charter as a limitation of powers. But despite the logic and despite the language of the 1912 change, in *State ex rel. Thomas v. Semple*¹⁹ the court refused to allow the City of Cleveland to support the "Conference of Ohio Municipalities" partly on the premise that the charter did not provide for such expenditures. Such a view manifests the proclivity of the court to consider the charter as the total grant of power, and for that reason the case has been criticized for its implicit denial of the fact that the source of powers of municipal government is found in the broad language of Article XVIII, Section 3. In California, where constitutional provisions are substantially similar to those in Ohio, it was decided in the leading case of *Bank v. Bell*²⁰ that a charter city could purchase and operate a municipal market despite the fact that there was no specific grant of authority in the charter to do so. The court said that ". . . the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force. If its charter gives it powers concerning them, it has those powers. If its charter is silent as to any such power, no general law can confer it. As to municipal affairs the charter, instead of being a grant of power, is, in effect, a limitation of powers. The city can exercise the power if the charter does not prohibit it." Similar language is found in *Matter of Nowak*,²¹ an earlier California case.

Although the California view is correct, its adoption in Ohio,

¹⁹ 112 Ohio St. 559, 148 N.E. 342 (1925).

²⁰ 62 Cal. App. 320, 329, 217 Pac. 538, 542 (1923), *rehearing denied* July 26, 1923.

²¹ 184 Cal. 701, 195 Pac. 402 (1921).

thereby recognizing that a charter is a limitation of power, would still leave a hazard to charter municipalities, assuming that they desire to exercise maximum power under Section 3. When confronted with the task of framing a charter in face of the knowledge that such a charter will constitute a limitation on the powers of the municipality, the charter commission is placed in the difficult position of framing a charter which will be as slight a limitation as possible. In an effort to overcome this difficulty, the framers of the Cincinnati charter incorporated in Article I the following language: "The city shall have all powers of local self-government and home rule and all powers possible for a city to have under the constitution of the State of Ohio. The city shall have all powers that now or hereafter may be granted to municipalities by the laws of the State of Ohio. All such powers shall be exercised in the manner prescribed in this charter, or if not prescribed herein, in such manner as shall be provided by ordinance of the council." The charter for the City of Cleveland has a similar provision. But it seems clear that if in subsequent articles of such a charter the drafters incorporate specific limitations on the municipal powers, such specific limitations would prevail over the general reservation of the type quoted above. So, it follows, a charter, no matter how carefully drawn, will impose limitations on the powers of the municipality.

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Procedure in Home Rule Charter Making

Before the amendments to the Ohio Constitution in 1912, every municipality in Ohio operated under a form of local government prescribed by general law as promulgated by the state legislature. By the amendments of 1912, the municipalities were given independent powers of local self-government and the power to establish by home rule charters their own forms of local government.

At the present time there are three possible methods of determining the form of local government available to any municipality. It may continue to function under the form of government defined by the state legislature. It may adopt one of the three optional forms of government, designed by the general assembly, by employing the procedure of initiative and referendum defined in Ohio General Code Sections 3515-1 to 3515-13. Finally, the city or village "may frame and adopt or amend a charter for its government" by following the procedural requirements of Sections 8 and 9 of Article